Supreme Court, U. S.
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No. 79-1779

In The
Supreme Court of the United States
October Term, 1979

STATE OF IOWA, STATE CONSERVATION COMMISSION OF THE STATE OF IOWA,

Petitioners,

ROY TIBBALS WILSON, CHARLES E. LAKIN, FLORENCE LAKIN, R. G. P. INCORPORATED, HAROLD, DARRELL L., HAROLD M. AND LUEA SORENSON, HAROLD JACKSON, OTIS PETERSON AND TRAVELERS INSURANCE COMPANY,

Respondents (Petitioners on Separate Petitions),

vs.

OMAHA INDIAN TRIBE AND THE UNITED STATES OF AMERICA,

Respondents.

REPLY BRIEF

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TABLE OF CONTENTS

Pages

Summary of Argument 1

Argument:

I. The questions presented by the petition of the State of Iowa are significant and should be considered at this time. 2

Conclusion 8

CITATIONS CITED

CASES:

Bolling v. Sharpe, 347 U. S. 497, 498 (1954) 3

Conkey v. Knudsen, 143 Neb. 5, 8 N. W. 2d 538 (1943), vacating 141 Neb. 517, 4 N. W. 2d 290 (1942) 6, 7

Nebraska v. Iowa, 143 U. S. 359 (1892) 7, 8

Peterson v. Morton, 465 F. Supp. 986 (D. Nev. 1979) 7

Stainback v. Mo Hock Ke Lok Po, 336 U. S. 368, 371 (1949) 3

Uhlhorn v. U. S. Gypsum Company, 366 F. 2d 211, 217 (8 Cir. 1966), cert. den., 385 U. S. 1026 ..... 5, 6

Veatch v. White, 23 F. 2d 69 (9 Cir. 1927) 6

Wiltse v. Bolton, 132 Neb. 354, 272 N. W. 197 (1937) 6, 7

TEXTS:

25 U. S. C. § 194 4

28 U. S. C. § 1254 (1) 3

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REPLY BRIEF

SUMMARY OF ARGUMENT

In their Briefs in Opposition, the United States and the Omaha Indian Tribe assert that the State of Iowa may not now seek review of the Court of Appeals' determinations of the Nebraska law of accretion and avulsion because the State's case was remanded to District Court. A favorable decision on remand would not render these issues moot because the State will be required to defend the severed portions of this action if the decision below is not

reversed. The issues raised by the State are also properly raised by other Petitioners. These issues should be considered at this time to avoid unnecessary trials and appeals and to insure compliance with the prior mandate of this Court.

The United States now contends that the panel's discussion of federal law as a source of Nebraska's definitions of accretion and avulsion is merely dictum. This view is inconsistent with the prior positions of the United States. The only analytical basis for the panel's determination of state law is the assertion that such reflects common law principles which Nebraska, relying on federal law, would follow. If the Court of Appeals erred in its construction of federal and common law, it had no rational basis for predicting change in Nebraska law.

ARGUMENT

I. The questions presented by the petition of the State of Iowa are significant and should be considered at this time.

The United States and the Tribe assert that the issues raised by the State's petition may become moot because its case was remanded to the District Court. Then, in order to avoid any review of the panel's construction of Nebraska law on remand, the Respondents here claim that the individual landowners are not adversely affected by the state law determination because the panel alternatively held that these landowners failed to meet their burden of

proof even if identifiable land in place were required to establish avulsion under Nebraska law. This analysis fails to recognize both the weaknesses of the panel's alternative holding and its interrelationship with the state law issues raised by the State of Iowa and individual petitioners. Furthermore, review is necessary at this time to avoid the waste of judicial resources required to try the complex proceedings rendered necessary by the panel's decision, to avoid unfairness to the individual Iowa landowners should the State prevail in a later appeal, and to insure compliance with the prior mandate of this Court.

A favorable decision for the State on remand would not render the State's petition moot. The Tribe's claim to 8,000 acres of land as accretion to the Barrett Survey could not proceed absent the Court of Appeals' decision quieting title in the Tribe to the land in the Barrett Survey area. The Tribe's claim for $50,000,000 in damages for trespass must also be tried if the panel's decision is not reversed. Neither the federal courts nor the defendants can afford the expense of additional lengthy trials and further appeals merely to obtain review of legal issues which are squarely presented at this time. *Stainback v. Mo Hock Ke Lok Po,* 336 U. S. 368, 371 (1949).

The extraordinary circumstances of this case warrant review by certiorari "before . . . rendition of judgment or decree" pursuant to the authority granted by 28 U. S. C. § 1254 (1). *See Bolling v. Sharpe,* 347 U. S. 497, 498 (1954). Only review at this time can insure compliance with the prior mandate of this Court to apply state law in order to protect the reasonable expectations of property owners. Review of the State's contentions after remand

or after the second quiet title proceeding could well result in different rules of law being applied to the claims of the State than to those of its co-defendants. The petitions of these co-defendants raise significant issues concerning the construction and constitutionality of 25 U. S. C. § 194. This Court should also grant certiorari to consider the state law issues at this time to avoid further proceedings in this Court.

The Tribe and the United States misconstrue the questions presented by the State and other petitioners by assuming that the only issue of Nebraska law contested is whether an avulsion can occur absent proof of identifiable land in place (Br. of U. S. 7-8; Br. of Omaha Indian Tribe 34-38). Because the alternate holding of the Court of Appeals assumed that identifiable land in place was a sine qua non of avulsion, the Tribe and the Government argue that the state law questions need not be considered. However, the alternate holding must also be affected by the Court of Appeals' erroneous views that one claiming accretion under Nebraska law must prove that sedimentation was gradual and that all land between the old and new channel was totally destroyed, that sandy areas submerged at high water are not part of the bed of a river but may instead be viewed as traceable land, that an avulsion may be found absent any evidence that the change was perceptible as it occurred, and that greater proof than expert testimony and historical and scientific evidence is necessary to prove accretion under Nebraska law.[1] These erroneous views of Nebraska law were not cured by the alternative holding.

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1 Implicit in this Court's prior opinion is the view that 25 U. S. C. § 194 imposed no greater proof than that required to carry the burden of quieting title under Nebraska law (A. 27).

Although neither the United States nor the Tribe cite any Nebraska case supporting these determinations of state law, the United States now asserts that any discussion of federal law below was "mere dictum" (Br. 10, n. 6-7). Yet the Court of Appeals went to great lengths to establish that Nebraska courts followed federal law in this area (A. 36-38). The United States relied at trial and in its appeal to the Eighth Circuit on a "jump" theory or "thalweg rule" by which it asserted that a sovereign boundary would not be affected by a rapid movement of the thalweg even if such movement were not a true avulsion. (Brief of the United States on Appeal 13, n. 7, discussing the primary case on which it relied, *Uhlhorn v. U. S. Gypsum Company*, 366 F. 2d 211, 217 (8 Cir. 1966), cert. den., 385 U. S. 1026.) According to that brief, this "thalweg rule," applicable to sovereign boundaries, differed from the rules otherwise applicable to riparian boundaries avulsion, accretion, or the island rule (pp. 8-13). After this Court's decision that Nebraska law governed, the United States claimed that such a river movement would constitute an avulsion under Nebraska law and asserted that the panel's original discussion of the federal law of accretion and avulsion remained valid as Nebraska law.[2] In support thereof, the United States claimed:

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2 The State and Iowa landowners had no opportunity to respond to these arguments on remand since the Court of Appeals required all briefs to be simultaneously filed, limited all briefs to ten pages, and expressly refused to allow any reply briefs. Order of July 11, 1979. Defendants' motion for additional briefing was overruled.

> The opinions of the Supreme Court of Nebraska setting out the law of accretion and avulsion seek to adopt the common law without alteration, and often rely on federal decisions to obtain the applicable rule of law.

(Supp. Br. of the U. S. on remand 3).

Unless this statement is erroneous, the reliance on federal law by the Court of Appeals cannot be dismissed as "mere dictum." Absent the argument that the Nebraska Supreme Court followed basic common law principles as articulated in federal cases, there is no analytical basis for predicting that the Nebraska Supreme Court would no longer follow *Conkey v. Knudsen,* 143 Neb. 5, 8 N. W. 2d 538 (1943), vacating 141 Neb. 517, 4 N. W. 2d 290 (1942), and *sub silentio, Wiltse v. Bolton,* 132 Neb. 354, 272 N. W. 197 (1937).[3] Remove the reliance on *Veatch v. White,* 23 F. 2d 69 (9 Cir. 1927), and *Uhlhorn, supra,* and there is almost no authority to support the definitions of accretion and avulsion adopted by the Court of Appeals panel.[4]

The United States dismisses the questions presented by the State as merely questions of state law. There are

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3 These Nebraska cases are discussed in the State's petition (pp. 14-18). Examination of the facts in both *Conkey* opinions and in *Wiltse* establish that mere proof of a sudden movement of a river channel in the bed of a river, even though significant and arising from a known cause, does not establish avulsion.

4 The Court cited no Nebraska cases in holding that identifiable land in place is not required for avulsion or that an avulsion could occur within the river bed but instead cited its prior opinion defining federal law (A. 42-43, n. 8).

two significant principles of federal law involved in this appeal—the authority of a federal court to ignore state property law decisions and the federal law of accretion and avulsion cited as the source of Nebraska law. If this Court were to conclude that the appellate court properly refused to follow *Conkey* and *Wiltse,* then it would be necessary to consider whether the Nebraska Supreme Court, relying on *Nebraska v. Iowa,* 143 U. S. 359 (1892), would have adopted the "common law principles" stated by the Court of Appeals. This is both a state and federal question of national significance. The law of accretion and avulsion in many states has developed in reliance on the respected common law authority of this Court. The new construction of that body of law by the Court of Appeals raises significant problems for many states and for property owners throughout the nation. As the District Court noted:

> The government would have us recognize avulsions in a variety of river movements that leave no commonly accepted indicia of an avulsion, particularly land in place and an abandoned channel. Moreover, if the indicia of avulsion are cast aside, then the distinction between accretion and avulsion will become virtually meaningless.

(A. B. 56). Because the United States would also stand to lose accretion lands if its own theory were followed as federal law, *see, e. g., Peterson v. Morton,* 465 F. Supp. 986 (D. Nev. 1979) (appeal pending), it is understandable that it should now contend that the Eighth Circuit's discussion of federal law is "mere dictum."

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CONCLUSION

The decision below clearly erodes the authority of *Nebraska v. Iowa,* 143 U. S. 359 (1892), on which many states including Iowa and Nebraska have relied. Like the sand in the Barrett Survey, the law of accretion and avulsion will be no longer identifiable if the decision of the Court of Appeals is not reversed. It is to correct these errors in the determination of state law and to preserve the long-standing rules of property which protect vested rights of riparian ownership that the State of Iowa requests this Court to issue the writ of certiorari.

Respectfully submitted,

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